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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1067

WALTER D. TEAGUE III, CHARLOTTE POLIN, UNITED STATES COMMITTEE TO AID THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM, LIBERATION, FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE, and FREE SCHOOL OF NEW YORK, INC.,

Petitioners,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners above mentioned respectfully pray that a writ of certiorari issue to review two judgments of the United States Court of Appeals for the Second Circuit entered herein on November 14, 1968.

Opinions Below

The opinions of the district court and the court of appeals have not been reported. The opinion of the court of appeals is printed below at page 1a. The two opinions of the district court are printed below at pages 12a and 19a.

Jurisdiction

The two judgments sought to be reviewed were entered November 14, 1968. The jurisdiction of this Court to review the judgments below is conferred by 28 U.S.C. §1254(1).

Questions Presented

1. Whether 50 U.S.C. App. §5(b), which permits the President or his delegate, during a period of "national emergency", to prohibit or regulate transactions involving any foreign country or its nationals, is unconstitutional as delegating legislative power without adequate standards, and invalid for overbreadth?

2. Whether the Foreign Assets Control Regulations, 31 C.F.R. Part 500, are unconstitutional for overbreadth in granting, with no standard for its exercise, power to an administrative official to issue or deny licenses to receive publications from China, North Korea and North Vietnam?

3. Whether the Foreign Assets Control Regulations, on their face and as applied, violate the First Amendment by prohibiting the receipt in the United States of unsolicited publications from China, North Korea and North Vietnam unless the addressee

(a) undertakes the burden and suffers the delay of obtaining a license;

(b) submits for a permanent public record his desire to receive publications from the proscribed countries; and

(c) assumes the burden of proving that he has made no payment?

4. Whether the Foreign Assets Control Regulations violate the First Amendment by prohibiting payment for publications originating in China, North Korea and North Vietnam?

Statute and Regulations

This case involves 50 U.S.C. App. §5(b) and the Foreign Assets Control Regulations, 31 C.F.R. Part 500. Pertinent portions of the Statute and Regulations are set forth in the Appendix, *infra*, at page 27a.

Statement of the Case

Petitioners are the addressees of mailed shipments of publications containing factual information and political opinion, and originating in North Vietnam and mainland China (R. 3, 5, 6, 7, 8, 162). The shipments of publications to three of petitioners, Liberation, Fifth Avenue Vietnam Peace Parade Committee, and Free School of New York, Inc., were occasional and unsolicited (R. 29, 31, 33). The shipments to petitioners United States Committee to Aid the National Liberation Front of South Vietnam (hereinafter "Aid Committee") and Teague, who is chairman of Aid Committee, were pursuant to requests and consisted of substantial quantities of publications which were sold or otherwise distributed to public and institutional libraries and to the public generally (R. 24-25).

Commencing in November, 1966, the Regional Commissioner of Customs detained such shipments and with re-

spect to each detention sent a notice to petitioners stating that the materials would not be released unless a license were obtained from Foreign Assets Control (R. 39, 46-49), an office in the Treasury Department which administers the Foreign Assets Control Regulations, 31 C.F.R. Part 500 (hereinafter "the Regulations"). Although printed forms for application for such licenses were enclosed with the notices (R. 44), neither the notice nor the printed forms stated on what basis, if any, licenses would be issued.

Without applying for licenses, petitioners commenced this action seeking a declaration that the Regulations and 50 U.S.C. App. §5(b) (hereinafter "the Statute"), which purportedly provided authority for the Regulations, were unconstitutional, and an injunction against their enforcement. Jurisdiction of the district court was based upon 28 U.S.C. §§1331, 1337 and 1356.

While the action was pending, petitioner Polin applied for licenses for publications addressed to her (R. 35). She received no response for four weeks, and that response was not a license, but a request for proof that the publications were gifts (R. 37).

Petitioners moved for summary judgment, or alternatively for a preliminary injunction, and for the convening of a three-judge court. At the time the motion for summary judgment was argued the Secretary of the Treasury amended §500.204 Appendix item (108) of the Regulations by adding a provision that publications and films from China, North Korea and North Vietnam "are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers."

The district court granted summary judgment to respondents.

After the entry of judgment, petitioner Teague, on behalf of himself and Aid Committee, filed an application for a license for all but a few of the publications addressed to them (R. 261). He had submitted an affidavit on the motion for summary judgment swearing that he had never made payment for publications shipped to him (R. 25). He repeated this assertion in the license application (R. 262, 264). Five weeks after the application was filed Mr. Teague received a letter requesting that he answer a full page of minutely detailed interrogatories, including a question requiring him to list all importations of publications for the past three years (R. 269-270).

This response was the first knowledge received by petitioners regarding the burdensome manner in which the Regulations are actually administered. They moved in the district court to vacate the judgment on the ground of newly discovered evidence.[1] The motion was denied.

On consolidated appeals from the judgment and from the order denying the motion to vacate the judgment, the court of appeals affirmed.

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[1] Although a notice of appeal had been filed, this procedure was followed on the authority of *Ryan* v. *United States Lines Company*, 303 F.2d 430 (2d Cir. 1962); *Smith* v. *Pollin*, 90 U.S. App. D.C. 178, 194 F.2d 349, 350 (D.C.Cir. 1952); *Binks Manufacturing Co.* v. *Ransburg Electro-Coating Corp.*, 281 F.2d 252, 260 (7th Cir. 1960); *Aune* v. *Reynders*, 344 F.2d 835, 841 (10th Cir. 1965).

Reasons for Granting the Writ

1. *The Regulations Are Not Valid as an "Incidental" Infringement of Free Speech.*

The court below declined to consider the petitioners' First Amendment arguments that the Regulations are overly broad in their grant of discretion to the administrator, that the licensing procedure is burdensome and time-consuming, that applicants must forego their right to anonymity and assume the burden of proof in the proceeding. Instead, the court mechanically followed *United States* v. *O'Brien,* 391 U.S. 367 (1968), and found that "the infringement of first amendment freedom is permissible as incidental to the proper, important, and substantial general purpose of the regulations."

Several facets of *O'Brien* demand clarification lest that case become the source of a new and harshly restrictive First Amendment doctrine. The opinion in *O'Brien* suggests that its scope was intended to be limited to "symbolic speech", in which the non-communicative elements are subject to governmental regulation, 391 U.S. at 376. If long established freedoms are to be maintained, *O'Brien* should, at a minimum, be expressly so limited.

O'Brien is an inappropriate authority for this case for a further reason. This Court has traditionally and deliberately avoided constitutional issues, where possible, by construing statutes in a manner to conform with constitutional requirements, see, e.g., *United States* v. *Rumely,* 345 U.S. 41 (1953); *Kent* v. *Dulles,* 357 U.S. 116 (1958); *Schneider* v. *Smith,* 390 U.S. 17 (1968); and cf. *United States* v. *Robel,* 389 U.S. 258, 262 (1967), holding the statute there in issue to be so precisely drawn that a construction on

constitutional grounds was unavoidable. *O'Brien,* like *Robel,* dealt with a clear and precise statute. The instant case, on the contrary, involves a broadly worded statute whose sole purpose is to regulate the flow of dollars or other economic benefits to the proscribed countries. To the extent that the Regulations sweep unsolicited publications into the licensing scheme, they are not incidental to the underlying purpose, but are foreign to it. The decision of the court below thus rejected an established rule of constitutional construction, and did so in a manner which upheld the statute without even inquiring into its effect on speech.

If, however, *O'Brien* is deemed to state the doctrine applicable to this case, then its full import deserves close scrutiny.

In the crucial passage in *O'Brien,* the Chief Justice, noting the inherent imprecision in the language used, stated, 391 U.S. at 377:

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

This seemingly simple statement raises a host of questions. The first is whether the Statute and Regulations are within a constitutional power. The notion of an inherent "foreign relations power", see, e.g., *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936), and *Perez* v.

Brownell, 356 U.S. 44 (1958), has lost much, if not all, its authority in the overruling of *Perez* by *Afroyim* v. *Rusk,* 387 U.S. 253 (1967). The war power certainly is no source of power until war is declared, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), and even then is no authority for undermining fundamental liberties, *United States* v. *Robel, supra* at 263-264. The only conceivable basis for the Regulations is the commerce power. Broad as it is, the power to regulate commerce certainly does not stand higher than the First Amendment in our constitutional system.

A second question relates to the importance of the governmental interest. Any limitation on free speech, even a bald censorship measure, can readily be expressed as incidental to a program effecting nonspeech purposes. Moreover, the mere fact of enactment indicates that the enacting authority deems a statute or regulation to have a substantial governmental interest. It is hardly a proper task for the courts to sit in judgment of a legislature and determine one statute to be trivial, another vital. The court below distinguished *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), because the Solicitor General in that case had conceded that the governmental interest was not compelling, 381 U.S. 309. But *Lamont* involved a statute duly enacted by Congress after extensive committee hearings and full deliberation. The regulations here in issue are the work of the Secretary of the Treasury, issued without notice or debate. It is a dubious proposition that a cabinet member's unilateral fiat evidences a more pressing national interest than an act of Congress.

The court of appeals, following its earlier decision in *Sardino* v. *Federal Reserve Bank,* 361 F.2d 106, 112 (2d Cir. 1966), *cert. denied,* 385 U.S. 898, held that "hard cur-

rency is a weapon in the struggle between the free and communist worlds" so that "the Regulations contribute to the furtherance of a vital interest of the government." Whether great national interests would suffer if trade with the proscribed countries were permitted is, of course, a question of political judgment. It is enough to point out that trade with the largest portion of the communist world is unrestricted. The Regulations themselves permit libraries and learned institutions to purchase publications, 31 C.F.R. §500.204 appendix item (108). Thus the government acknowledges that an absolute prohibition of commerce is not required. Can it then be said that the government interest in prohibiting commerce is so great that even unsolicited publications must be licensed?

Another question relates to the nature of the First Amendment right at stake. The right sought to be exercised by petitioners is at once the most important and the least offensive: the right passively to receive informative publications. It is the ultimate right of the citizen to inform himself. In contrast to the protester in *O'Brien,* see Mr. Justice Harlan's concurring opinion, 391 U.S. at 388, there is no alternative manner by which petitioners may achieve the same ends.[2]

A final question in terms of *O'Brien* is whether the Regulations impose restrictions "greater than is essential." The administrative procedure, as discussed below, is unreasonably burdensome and time-consuming. More important, it is totally unnecessary. The government

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[2] The statement by the court of appeals that the publications "are available at 'universities, libraries, [and] research and scientific institutions,' 31 C.F.R. §500, 204 App. ¶108", is without support. That such institutions may procure the publications obviously does not mean they will.

argued in the courts below that its only concern is to prevent the transmission of money to the proscribed countries. The Regulations, 31 C.F.R. §500.201(a), expressly prohibit such payments, and a violation of the Regulations is a felony. Surely criminal sanctions are a sufficient deterrent to making payment, as they are deemed to be with a vast array of far more serious anti-social behavior, without imposing a licensing requirement as well.

The burden of establishing that the Regulations are improper, or that adequate alternatives are available, is not petitioners'. Where First Amendment rights are violated, the government must justify the infringement, *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 466 (1958); *Sherbert* v. *Verner,* 374 U.S. 398, 406-407 (1963).

Unless *O'Brien* offers the government a short cut through the barriers of the First Amendment, the Regulations must be judged by accepted standards. When so measured they clearly fail the constitutional test.

2. *The Statute Delegates Legislative Power Without Adequate Standards.*

The Statute grants to the President or his designee, in time of war or national emergency, power to regulate or prohibit transactions involving property in which "any foreign country or a national thereof" is interested. This vast regulatory power is limited by no standard. The lack of standards is apparent from the variety of unrelated uses to which the Statute has been put. As originally enacted in World War I it was a wartime measure to prohibit trade with the Central Powers (thus its name, The Trading with the Enemy Act). During the depression, with the addition of the words "or any other period of

national emergency", the Statute supported a number of economic measures during the financial crisis of 1933. On the eve of World War II, it was used to freeze the property, not of the soon-to-be enemy, but of the nations overrun by the Nazis. (See *United States* v. *von Clemm,* 136 F.2d 968 (2d Cir. 1943), *cert. denied,* 320 U.S. 769, a criminal prosecution for trading in Dutch diamonds at a time when trade with Germany was unrestricted.) Most recently the Statute was deemed authority for restricting foreign investment to ease the pressure of adverse balance of payments, 33 Fed. Reg. 47. The catch-all nature of the Statute is emphasized in its codification not only as §5(b) of the Appendix to title 50 U.S.C., but also as §95a of title 12 U.S.C.

Some curb on the breadth of the delegated power would appear to be present in its limitation to "time of war or during any other period of national emergency declared by the President". Despite the holding of *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543 (1924), to the contrary, the court below reaffirmed the statement in *Sardino* v. *Federal Reserve Bank, supra,* 361 F.2d 106, 109, that "the courts will not review a determination" of the President that an emergency exists. It went on to state, however, that "there can hardly be doubt as to the existence of an emergency today," and noted that the emergency declared by President Truman in December, 1950 (64 Stat. A454), has never been revoked.

Certainly we live in troubled times, but troubled times do not constitute an emergency. There is no authority suggesting that "emergency" is a term of art. The word has a precise meaning: "a sudden, generally unexpected occurrence or set of circumstances demanding immediate

action", Webster's New World Dictionary. What may have been an emergency in 1950 can hardly remain such almost two decades later. If, as the court below stated, an emergency is no more than what the President declares by proclamation, the overbreadth and lack of standards is surely beyond constitutional sanction.

The delegated power may be exercised with respect to any country toward which the interest of the Executive may be directed, and the extent of regulation, or exemption from it, is left to the unfettered discretion of administrative officials. Its use is not even restricted to nations toward which there is an official animosity, for it has been used to freeze the assets of friendly nations, and to restrict foreign investment in general.

Such unlimited delegation of legislative power is constitutionally impermissible. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). Where fundamental rights are affected, a narrow construction must be given to delegated powers, *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *Niemotko* v. *Maryland*, 340 U.S. 268, 271-272 (1951).

3. *The Regulations Violate the First Amendment.*

(a) *Overbreadth.* The Regulations prohibit every conceivable transaction involving in any way the three proscribed countries, China, North Korea and North Vietnam, unless licensed by Foreign Assets Control, a fourth echelon office in the Treasury Department. There is no standard set forth by which Foreign Assets Control is to be guided in granting licenses. The discretion of the administrator is completely unrestricted. In response to the motion for summary judgment in this action, the Regulations were amended by adding a sentence to 31 C.F.R. §500.204 Ap-

pendix item (108). The new sentence provides that films and publications will be licensed if the administrator is satisfied that they are bona fide gifts. This apparent standard, however, is subject to the reservation by the Secretary of the Treasury to exclude particular persons or transactions from the operation of any license, 31 C.F.R. §500.503. And it does not purport to be the only basis on which licenses will be granted.

(b) *Burden and delay.* Even if adequate standards were provided, the mere requirement that a license be obtained as a condition to exercising a First Amendment right renders the Regulations unconstitutional. In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), it was held that the minor burden of returning a postcard was an impermissible burden upon rights identical to those asserted in this case: the right to receive unsolicited publications from China. Here a formal application must be prepared in duplicate and submitted.[3] The mere requirement of applying for a license is likely to be a total deterrent to the addressee of unsolicited material. After the application is filed the addressee must then await the grinding of the administrative process. The government asserted below that licenses would normally be granted in about ten days. But ten days is too long to wait for an administrator to pass upon First Amendment rights, *Freedman* v. *Maryland,* 380 U.S. 51 (1965); *Teitel Film Corp.* v. *Cusack,* 390 U.S. 139 (1968); *Carroll* v. *Princess Anne,* —— U.S. ——, 89 S.Ct. 347 (1968).

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[3] The burden is compounded by the fact that neither the notice of detention nor the printed application forms indicate that publications presumably will be licensed upon proof that they are gifts. The applicant unfamiliar with the Regulations can only guess at what information to submit.

The government's assertion that ten days is the normal processing period, however, is not borne out by the record. Miss Polin's application was not acted upon for four weeks, and the response was not a license, but a demand for information establishing that the material sent to her was a gift. The government justified that delay as resulting from the pendency of this litigation, and the courts below accepted that explanation. The only other application in the record is that of Mr. Teague, who submitted his after judgment had been entered in the district court. As a party to the action, he was aware that the concern of Foreign Assets Control purported to be whether payment was involved, and his application emphatically stated that no payment was being made. Yet he waited five weeks for a response and then received a demand that he answer a set of detailed interrogatories. Both the district court and the court of appeals found this inordinate delay also to be the result of the pending litigation. Neither court explained why the pendency of an action, after judgment and before appeal, should affect the speed of the administrative process.

(c) *Loss of anonymity.* The filing of an application for a license results in a permanent public record indicating the applicant's desire to receive publications from what the government described in its brief in the court below as "the enemy". The mere existence of such a record and its potential for being utilized by investigative agencies and congressional committees may be a forbidding deterrent to the exercise of basic rights. This was a substantial factor in *Heilberg* v. *Fixa,* 236 F.Supp. 405, 409 (N.D.Cal. 1965) and *Lamont* v. *Postmaster General,* 229 F.Supp. 913, 921 (S.D.N.Y. 1965) (dissenting opinion). While those cases were pending on appeal to this Court, the government de-

liberately mooted the question by destroying the offending records, *Lamont* v. *Postmaster General,* 381 U.S. at 303. Even without permanent records, this Court noted that there remained an impermissible deterrent: "[A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda'." 381 U.S. at 307.

If the active disseminator of political material is protected by a right to anonymity, *Talley* v. *California,* 362 U.S. 60 (1960); *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *id.,* 290 F.Supp. 244 (E.D.N.Y. 1968), *prob. juris. noted,* 393 U.S. 818; cf. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958), the passive recipient must have equal, if not greater rights.

(d) *Burden of proof.* The Regulations, as administered, contain a further abridgment of free speech: The burden of proof that the publications are gifts has been cast upon the addressee. Proof of a negative—nonpayment—is classically fraught with problems. To impose such a burden in the area of free speech and press is intolerable. The issue is compounded by the fact that payment, if made, would itself be a criminal act, in violation of 31 C.F.R. §500.201 (a). Thus, as a condition to exercising preferred constitutional rights, the citizen must not only disclaim the commission of a crime (on a form prominently noting the criminal penalties of a false statement under 18 U.S.C. §1001), but he is then put to the burden of proving his innocence. It is doubtful that such a requirement could be imposed as a condition to the exercise of any right or privilege. Where the right is that of speech, the condition must fall, *Speiser* v. *Randall,* 357 U.S. 513 (1958).

4. *The Right to Pay for Publications Is Guaranteed by the First Amendment.*

Petitioner Aid Committee sought a declaration that its right to pay the purchase price of publications could not be restricted by the Regulations. The courts below did not discuss this claim, apparently assuming that by upholding the requirement that licenses be obtained for gratis shipments it was unnecessary to consider the problem of payment. The two situations, however, do not necessarily have that interdependence. Even if a licensing requirement is held to be proper, there remains the question of the standards by which licenses are to be issued.

It is self-evident that in many areas, the exercise of First Amendment rights involves a commercial transaction. The right to pay the price of a publication is crucial to the underlying right to be informed. Only a small portion of the dissemination of opinion and ideas is effected by gratis distribution. On the contrary, most of the media for such expression are commercial ventures. Book, newspaper and magazine publishers have as their primary purpose the making of profit. But this does not detract from the First Amendment rights which are thereby exercised and which unquestionably merit the full protection afforded by the Constitution, *Thomas* v. *Collins,* 323 U.S. 516, 531 (1945).

Even if regulation of commerce as such with a country subject to the Regulations be proper, restrictions must fall where they interfere with free speech and press, just as the power to tax, certainly one of the broadest of governmental powers, may not be used to abridge the right to publish. *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

The payment for publications might indeed give some economic benefit to the governments of the proscribed countries, but that benefit is patently trifling. The Regulations acknowledge that purchase of publications from North Vietnam, China and North Korea by universities, libraries, research and scientific institutions is consonant with national policy, 31 C.F.R. §500.204 Appendix item (108). The rights of the citizen, however, are certainly as great as those of the learned institutions. It was for the citizen and his role in the democratic process that the bill of rights was enacted.

CONCLUSION

The petition for certiorari should be granted.

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February 1969

APPENDIX A

Opinion of the Court of Appeals

Before: LUMBARD, *Chief Judge*, KAUFMAN and HAYS, *Circuit Judges*.

HAYS, *Circuit Judge*:

Appellants are the addressees of mail packages containing publications originating in North Vietnam and mainland China. When these packages reach the United States they are detained by the Commissioner of Customs pursuant to the Foreign Assets Control Regulations, 31 C. F. R. §500.808 (1968).[1] The Commissioner sends letters of notice to the addressees advising them of the detention and stating that the material will be released only if Foreign Assets Control issues a license.

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[1] 31 C. F. R. §500.808 Customs Procedures; merchandise specified in §500.204.

(a) With respect to merchandise specified in §500.204, whether or not such merchandise has been imported into the United States, directors of customs shall not accept or allow any:

(1) Entry for consumption (including any appraisement entry, any entry of goods imported in the mails, regardless of value, and any other informal entries);
. . . until either;

(i) A specific license pursuant to this chapter is presented, [or]

(ii) Instructions from the Foreign Assets Control, either directly or through the Federal Reserve Bank of New York, authorizing the transaction are received . . . .

Appellants did not apply for licenses for the packages addressed to them,[2] but brought this action, asserting that the Foreign Assets Control Regulations and the Trading with the Enemy Act §5(b), 50 U. S. C. App. §5(b) (1964), abridge their first amendment rights, that the statute unconstitutionally delegates legislative power to the President, that the President has unlawfully delegated powers to the Director of Foreign Assets Control, and that the statute and regulations deprive appellants of property without due process of law. They seek a declaratory judgment that the statute and regulations are unconstitutional, that no licenses need be obtained or applied for in transactions involving the importation of North Vietnamese or Chinese publications, and that payment for those publications may be made directly to the publishers rather than into blocked accounts. Appellants also ask for an injunction preventing the Commissioner from continuing to detain the publications already in his possession.

Plaintiffs moved for summary judgment or, alternatively, for a preliminary injunction and the convening of a statutory three-judge court. Defendants challenged the court's jurisdiction, and themselves sought summary judgment dismissing the complaint.

The district court held that it had jurisdiction under Section 1337 of the Judicial Code, 28 U. S. C. §1337 (1964), but granted summary judgment dismissing the complaint.

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[2] Plaintiff Charlotte Polin applied for the required licenses after the commencement of this action but before its dismissal by the district court. It took 8 weeks for the license to be issued and plaintiffs argued below that such a delay was an excessive burden to be placed on the exercise of first amendment rights. The court found, however, that the length of the delay was "apparently due to the pendency of this litigation as well as to [Polin's] own tardiness in supplying the required information," and that the normal delay should be only about 10 days. Miss Polin later applied for another license, which was processed within 10 days.

Appellant Teague thereupon applied for a license. Five weeks later he received a letter from the Federal Reserve Bank of New York requiring that he amplify his application by answering a series of questions. He has not done so. Instead, relying on the delay involved in processing Teague's application, plaintiffs moved pursuant to Fed. R. Civ. P. 60(b) to vacate the order of dismissal, arguing that the regulations involved a far more burdensome procedure than had previously been assumed to exist. The court denied the motion, finding that the length of the delay involved was attributable to the pending litigation, and that while some delay could always be expected it would be closer to 10 days than to 5 weeks.[3]

Plaintiffs have appealed from both judgments. We affirm.

I.

Section 5(b) of the Trading with the Enemy Act, 50 U. S. C. App. §5(b) (1964), authorizes the promulgation, during the time of war or other national emergency, of regulations controlling the flow of American currency to foreign nations.[4]

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[3] See note 2 *supra*.

[4] During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, . . . and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or

In December 1950 President Truman proclaimed the existence of a national emergency. 64 Stat. A454 (1950). That proclamation has never been revoked. Although the proclamation took particular note of "recent events in Korea and elsewhere," it also made general reference to "the increasing menace of the forces of communist aggression."

As this court said in *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106, 109-10 (2d Cir.), cert. denied, 385 U. S. 898 (1966):

> "The declaration has never been revoked; rather it has been repeatedly and recently reaffirmed. . . . While the courts will not review a determination so peculiarly within the province of the chief executive, there can hardly be doubt as to the existence of an emergency today when thousands of United States troops are in action and many more are in readiness around the globe. Plaintiff's contention that the national emergency provision, which came into the statute at the time of the economic crisis of 1933, 48 Stat. 1, is limited to economic emergencies, is sufficiently answered by

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privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States . . . ; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision . . . .

the breadth of the language. The understanding that the words mean all they say was illustrated by President Roosevelt's freezing the assets of nationals of Norway and Denmark on the invasion of those countries by Germany long before the United States was at war . . . . We take the prompt Congressional ratification . . . as a demonstration of approval of what was already lawful rather than as an indication of doubt."

Acting under the authority of the Trading with the Enemy Act and the declared state of national emergency, the Secretary of the Treasury, to whom the President delegated his rule-making power under the Act, promulgated the Foreign Assets Control Regulations, 31 C. F. R. Part 500 (1968). The relevant portions of those regulations are set forth in the margin.[5]

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[5] §500.201 Transaction involving designated foreign countries or their nationals; effective date.

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

. . .

(3) The exportation or withdrawal from the United States of gold or sliver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by

II.

Plaintiffs challenge the constitutionality of the Trading with the Enemy Act, contending that the Congress has delegated legislative power to the President without fixing standards. And they assert that the powers delegated to the President (if constitutionally delegated to him) are

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him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

. . .

(d) The term "designated foreign country" means a foreign country in the following schedule . . . :

SCHEDULE
COUNTRY AND EFFECTIVE DATE

1. China: December 17, 1950.
2. North Korea . . . : December 17, 1950.
3. North Viet-Nam . . . : May 5, 1964.

§500.204 Importation of and dealings in certain merchandise.

(a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is:

(1) Merchandise the country of origin of which is China (except Formosa), North Korea, or North Viet-Nam . . . .

§500.204 Appendix.

(108) *Publications and films from China, North Korea and North Viet Nam.* Publications and films originating in main-

personal to his office and may not constitutionally be delegated to the Secretary of the Treasury or the Director of Foreign Assets Control. These precise contentions were raised and dismissed in *Sardino* v. *Federal Reserve Bank, supra.* Far from overruling *Sardino,* as plaintiffs urge us to do, we reaffirm it as a sound and well-reasoned decision.

Plaintiffs contend that even if *Sardino* is reaffirmed a different set of standards should apply to the present case because the challenges on the basis of overbroad delegations of power involve first amendment claims. Our conclusion that plaintiffs' first amendment rights have not been violated makes it unnecessary to decide that issue.

Sardino also provides a sufficient answer to plaintiffs' contention that the statute and the regulations deprive them of property without due process of law.

III.

Plaintiffs' major contention is that the statute and regulations violate the first amendment. They argue both that it is unconstitutional to subject the exercise of first amend-

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land China, North Korea or North Viet Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films originating in mainland China, North Korea, and North Viet Nam are also licensed without restrictions as to method of payment under programs approved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefit to designated countries or nationals thereof from the importations.

ment rights—the receipt of publications—to "burdensome and time-consuming administrative procedures," and that the regulations require the keeping of records that impair the applicants' right to anonymity.

The challenged regulations were designed to limit the flow of currency to specified hostile nations: mainland China, North Korea, and North Vietnam. We are presently in a state of armed conflict with North Vietnam; and while we are not at war with either China or North Korea our relations with those nations are hardly peaceful. As we noted in *Sardino,* "Hard currency is a weapon in the struggle between the free and the communist worlds." 361 F. 2d at 112. The regulations contribute to the furtherance of a vital interest of the government.

It is true that the regulations result in some limitation on the availability of publications and films originating in China, North Korea, and North Vietnam. To the extent of this limitation the regulations impinge on first amendment freedoms. However, restricting the flow of information or ideas is not the purpose of the regulations. The restriction of first amendment freedoms is only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations. Moreover there is no censorship of selected materials; all publications from the specified nations are treated alike. 31 C. F. R. §500.204 App. ¶108 (1968).

The challenged regulations themselves provide for the availability of the foreign publications. They can be, and are, admitted if the payments for them are made into blocked accounts or if the publications are sent as gifts. *Id.* And the publications are available at "universities, libraries, [and] research and scientific institutions," 31

C. F. R. §500.204 App. ¶108 (1968), which are allowed to import them without restriction as to payments.[6]

The Supreme Court has recently said:

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U. S. 367, 376-77 (1968) (footnotes omitted).

Applying the Supreme Court's test here we conclude that the infringement of first amendment freedoms is permissible as incidental to the proper, important, and substantial general purpose of the regulations.

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[6] The existence of an exception that allows a small sum of money to flow to the hostile nations in order to protect first amendment freedoms by making the foreign publications available to those institutions that can give the publications the broadest exposure to the public and that can make the greatest use of them for purposes of study, does not justify an attack on the basic regulation.

Plaintiffs point to the lengthy delays involved in processing the license applications of Teague and Polin and argue that *Freedman* v. *Maryland,* 380 U. S. 51 (1965), requires the invalidation on constitutional grounds of such a time-consuming procedure. The government indicated, however, that the delays in processing the Teague and Polin applications were attributable to this lawsuit, because the Treasury Department was forced to coordinate its activities with the Justice Department. The district court found that a license application can typically be processed within 10 days. In any event, we do not consider *Freedman* v. *Maryland* controlling in a situation such as this. *Freedman* was concerned with the length of time required to adjudicate whether a film was obscene in light of the presumption of unconstitutionality borne by any system of prior restraints of expression, see 380 U. S. at 57, and cases cited. Here, by contrast, there is no inquiry into the content of detained material. The only delay is that required to determine that money is not being sent to one of the designated nations; there is no design to limit the free flow of ideas.

Lamont v. *Postmaster General,* 381 U. S. 301 (1965), is not apposite. As Mr. Justice Brennan noted in his concurring opinion in *Lamont, id.* at 309, the solicitor general expressly conceded that no compelling governmental interest required enactment of the statute there called in question. The only purpose of the statute was to protect the sensibilities of recipients of Communist political propaganda who might be offended by getting publications espousing unpopular ideas. Here the government's purpose is obviously enormously more important and substantial.

Finally, plaintiffs contend that the licensing procedure violates their fifth amendment right against self-incrimina-

tion. They rely on *Haynes* v. *United States*, 390 U. S. 85 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Marchetti* v. *United States*, 390 U. S. 39 (1968). We find those cases, and *Albertson* v. *Subversive Activities Control Bd.*, 382 U. S. 70 (1965), to be inapplicable. By answering the questions posed on the required forms in those cases petitioners could have found themselves subjected to criminal prosecution. The information to be supplied by these plaintiffs on the forms required here would have no tendency to incriminate them.

The judgments of the district court are affirmed.

Opinions of the District Court

OPINION AND ORDER OF TYLER, J., GRANTING SUMMARY JUDGMENT TO DEFENDANTS

TYLER, *D.J.*:

Plaintiffs are two individuals and four groups. They have all been sent and wish to receive mail shipments of certain publications originating from and published in North Vietnam and mainland China. At least since November 1966, the defendants have detained the shipments because the Foreign Assets Control Regulations, 31 C.F.R. § 500.204, issued pursuant to the Trading with the Enemy Act, § 5(b)(1), 50 U.S.C. App. § 5(b)(1) prohibit the importation of any merchandise, the country of origin of which is China (except Formosa) (hereinafter "Red China") or North Vietnam other than as authorized.[1]

There is a specific exception to this general prohibition to permit the importation of publications. On May 30, 1967, after the commencement of this action, the provision dealing with the importation of publications was amended to provide the following:

> "(108) Publications and films from China, North Korea and North Vietnam. Publications and films originating in mainland China, North Korea or North Viet Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films orginating in mainland China, North Korea, and North Viet Nam are also licensed without restrictions as to method of payment under programs ap-

[1] "Except as specifically authorized . . . by means of regulations, . . . no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is:

(1) Merchandise the country of origin of which is China (except Formosa), North Korea, or North Viet-Nam." 31 C.F.R. § 500.204.

proved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefit to designated countries or nationals thereof from the importations." 32 Fed. Reg. 7829-7830 (1967), amending 31 C.F.R. § 500.204 appendix § (108).[2]

Contending that the requirement that they obtain a license violates their First Amendment rights, plaintiffs, with the exception of Charlotte Polin, have refused to make the necessary applications to receive the publications. Because she needed the literature for her work, Charlotte Polin reluctantly applied for and obtained a license. She, however, alleges that the administrative delay in connection therewith constituted an infringement of her First Amendment rights. In addition, plaintiffs Walter Teague III and United States Committee to Aid the National Libera-

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[2] Until amended, section (108) read as follows:

"(108) Publications from China, North Korea and North Viet-Nam. Publications imported directly from mainland China, North Korea or North Viet-Nam may be licensed for commercial importation provided all payments due to the Chinese, Korean or Viet-Namese suppliers are made into blocked accounts. Publications from mainland China, North Korea and North Viet-Nam may also be licensed without restrictions as to shipment or method of payment under programs approved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications may also be licensed in exchange for publications from the United States."

tion Front of South Vietnam ("Aid Committee") allege that the regulation which prevents their making direct payments to the suppliers or publishers of the literature is an abridgement of their First Amendment rights.

On December 30, 1966 plaintiffs filed a complaint requesting certain declaratory and injuncive relief. Specifically they have asked that the statutes and regulations thereunder be declared unconstitutional, that they be allowed to receive any printed material containing factual information or political opinion without first applying for or obtaining a license, and that Aid Committee be permitted to pay the publishers for whatever material might be sent. In addition, they have requested that the Regional Commissioner of Customs and the Secretary of the Treasury be enjoined from enforcing the statute and regulations in any manner which would restrict the importation of printed material, regardless of the country of origin.

Plaintiffs have now moved for summary judgment. In the alternative, they pray that a temporary injunction be issued and a statutory three-judge court be convened pursuant to 28 U.S.C. §§ 2282 and 2284 to hear and determine all the issues. The defendants have cross moved for summary judgment on the merits and, in addition, ask that the complaint be dismissed for lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1).[3]

I.

Plaintiffs in their original complaint alleged only federal question jurisdiction. 28 U.S.C. § 1331. Defendants in their original answer denied jurisdiction under section 1331

[3] There is an additional motion by plaintiffs pursuant to rule 30(b), F.R.Civ.P. to vacate defendant's five notices to take plaintiffs' depositions. In view of the disposition of the other motions, it is unnecessary to pass on the issues raised by this application.

in that the amount incontroversy did not exceed $10,000, pointing out that the estimated value of the detained publications was and is only $2060.

Subsequent to the argument of their motion for summary judgment, plaintiffs moved to amend their complaint to state two additional bases of jurisdiction under 28 U.S.C. §§ 1337 and 1356. The defendants, without conceding the sufficiency of these allegations, did not oppose the motion to amend, which is granted. Consequently, the threshold question of whether there is jurisdiction will be resolved on the basis of the amended complaint.

Section 1337 gives the district courts original jurisdiction of actions arising under an act of Congress regulating commerce, regardless of the amount in controversy. Since this action calls into question the validity, enforcement or construction of such a statute, I assume that there is jurisdiction pursuant to section 1337. See *Mulford* v. *Smith*, 307 U.S. 38 (1939).

II.

The application to convene a three-judge court must be denied. Section 5(b) of the Trading with the Enemy Act was recently upheld against a similar attack by the Court of Appeals for this circuit. *Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 (1966). In *Sardino*, the appellate court considered whether the district court should have convened a three-judge court and concluded that because the substantial constitution attack was not upon the Trading with the Enemy Act but upon the Cuban Assets Control Regulations, no three-judge court was required. *Id.* at 113-116.

Apparently mindful of *Sardino*, plaintiffs here argue that there are essentially three constitutional infirmities in the statute: (1) it represents an unconstitutional delegation of legislative power to the president; (2) it is an uncon-

stitutional delegation of presidential power to a minor official; and (3) it is unconstitutionally broad in that it provides no standards for reviewing the determination that an "emergency" exists.

These arguments are practically identical to those raised in *Sardino*. In addition to upholding the statute, that case held that the constitutional attack on the Trading with the Enemy Act was so insubstantial as not to warrant the convening of a three-judge court.

As in *Sardino*, the only potentially substantial argument raised by these plaintiffs is directed at the regulation, here 31 C.F.R. § 500.204 appendix § (108), which requires that they furnish certain information and obtain a license before they will be allowed to receive the publications. As such, it is not an attack against the statute. In the event that the regulation were deemed unconstitutional, the court would be bound to interpret the legislative mandate as not authorizing the regulation, leaving the Act of Congress untouched. *Sardino*, at 115.

Accordingly, the application to convene a three-judge court must be denied. See also *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939).

III.

As indicated heretofore, the only substantial question presented in this action is whether it is an unreasonable intrusion on First Amendment rights to condition receipt of these publications upon a showing that the publications are bona fide gifts or, if not, that any payments have been made only as specifically authorized by the regulations.

The obvious purpose of the pertinent regulation is to prohibit the countries of North Korea, North Vietnam and Red China from deriving any economic benefit whatsoever

from any transactions which they or their nationals might have with persons subject to the jurisdiction of the United States. In the present posture of United States diplomatic relations—or lack thereof—with these countries, the reasons for the policy are obvious and merit no extended discussion. In fact, plaintiffs do not appear to question the underlying policy, arguing only that when, as here, it is applied to the importation of publications from these countries, it is an unconstitutional infringement of First Amendment rights.[4]

Plaintiffs rely on the case of *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965) in which a statute requiring the Postmaster General to detain and to deliver only upon the addressee's request unsealed foreign mailings determined to be "communist political propaganda" was declared unconstitutional.

Lamont, however, involved a different statute, a substantial effect of which to inhibit, or at least make more difficult, the exercise of First Amendment rights. As such, it presented a plainer constitutional problem.

Here, the pertinent statute is obviously directed at vindication of a compelling national interest. Specifically, of course, the statute is aimed at avoiding aid and comfort to non-friendly governments by shutting off the unrestricted flow of American dollars in return for merchandise shipped from such countries. Surely the constitution commands few higher obligations of the executive and the legislature than those of waging war and conducting our relations with foreign powers. During this period of undeclared but nevertheless very real wars involving this nation, the Trading with the Enemy Act is a diplomatic weapon, the importance of which cannot be gainsaid.

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[4] There can be no question but that the regulation applies to the importation of publications. Plaintiffs' suggestion that it does not so apply is based on their counsel's analysis of the wrong regulation, 31 C.F.R. § 500.201.

It is relevant in the context of this case to note that the regulation which provides for the licensing of publications from Red China and North Vietnam is an exception to the general command that no merchandise be imported from either country. It is a regulation drawn with care to achieve a realistic and desirable balance between the needs of our foreign policy as summarized above and the rights of individuals trying to enjoy First Amendment freedoms.

Section (108) place no restrictions on the kinds of publications which may be imported. It states with reasonable precision that publications such as these which originate in Red China or North Vietnam will be licensed upon a showing that neither these countries nor their nationals have derived any benefit from the transactions. The only burdens upon the plaintiffs are the minimal ones of providing the required information and waiting approximately ten days for the application to be processed.[5]

I am aware of the admonition in *Lamont* that, "In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose." *Lamont,* at 310 (concurring opinion of Mr. Justice Brennan). But this is precisely the kind of regulation which plaintiffs attacks, and any inconvenience to plaintiffs as here alleged is outweighed by the national interest in restricting the flow of dollars to North Vietnam and Red China.

Summary judgment dismissing the complaint is granted to the defendants. All other motions not heretofore specifically disposed of are denied. It is so ordered.

Dated: New York, N. Y.,
August 4, 1967.

H. R. Tyler, Jr.,
U. S. D. J.

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[5] The somewhat longer delay in the case of Charlotte Polin was apparenty due to the pendency of this litigation as well as to her own tardiness in supplying the required information.

OPINION AND ORDER OF MANSFIELD, J., DENYING MOTION TO VACATE JUDGMENT

MANSFIELD, *D.J.*:

Plaintiff moves, pursuant to Rule 60(b)(2), F.R.C.P., to vacate this Court's order of August 7, 1967, which granted summary judgment dismissing plaintiffs' declaratory judgment action, on the ground of newly discovered evidence.

The complaint alleges that in November and December, 1966, the Regional Commissioner of Customs, acting pursuant to the Trading With the Enemy Act, 50 U.S.C. App. § 5(b)(1) and the Foreign Assets Control Regulations, 31 C.F.R. § 500.204, *et seq.*, detained packages of printed matter published in North Vietnam mailed to plaintiffs at their request. In each case, the Commisioner notified plaintiff of his intention and advised them that it was necessary to obtain licenses * from Foreign Assets Control in order to obtain the literature.

On December 30, 1966, plaintiffs, without applying for licenses, brought the declaratory judgment action to prevent enforcement of the relevant legislation and the regula-

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* 31 C.F.R. § 500.204(108), as amended on May 30, 1967, provides:

> "*Publications and films from China, North Korea and North Vietnam.* Publications and films originating in mainland China, North Korea or North Vietnam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. . . . Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefit to the designated countries or nationals thereof from the importations." 32 Fed. Reg. 7829-7830 (1967), amending 31 C.F.R. § 500.204 (108).

tions thereunder on the ground that they offended plaintiffs' First Amendment rights to receive political literature. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). Thereafter, plaintiff Charlotte Polin, on January 23, 1967, applied for a license. On February 20, 1967, Foreign Assets Control requested proof that the publications imported by her were bona fide gifts, and thereafter she was granted a license.

On August 7, 1967, the complaint was dismissed by Judge Tyler on the ground that, in view of the compelling national interest in isolating North Vietnam economically, a licensing procedure that would prevent individuals from receiving literature emanating from North Vietnam for which they were required to provide financial or commercial benefit to that country could be established without infringing First Amendment safeguards. See *Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *United States* v. *Harriss*, 347 U.S. 612 (1954); Casenote, 79 Harv. L. Rev. 154 (1965). Plaintiff has appealed this decision to the Court of Appeals, where it is now pending. In the course of his opinion, Judge Tyler, while pointing out that in the normal course of events the only burdens imposed upon license applicants would be those of furnishing the necessary information and waiting ten days for the application to be processed, explicitly sanctioned the licensing procedure as it applied to Charlotte Polin on the ground that it was "apparently due to the pendency of this litigation as well as to her own tardiness in supplying the required information." 66 Civ. 4543, p. 14 n. 5.

On August 17, 1967, plaintiff Teague, in his personal capacity and on behalf of the United States Committee to Aid the National Liberation Front in South Vietnam, applied for a license to obtain the literature which was the subject of his declaratory judgment action, stating that

"the amount of the transaction is $00.00 as no monies are involved." On September 29, 1967, the Director of Foreign Assets Control, through its agent, the Federal Reserve Bank of New York, sent Teague a questionnaire seeking more detailed information regarding the transaction, together with information as to prior remittances that were sent to North Vietnam, informing him that "unless response to this inquiry is received within 30 days after date hereof, the application will be considered as having been withdrawn and our records will be marked accordingly." Thereupon, with the case on appeal, Teague brought his present motion to vacate the prior judgment on the ground that the administrative procedure that he had to face in order to obtain his license was substantially greater than that contemplated in Judge Tyler's decision. In his motion papers Teague asserts that the additional burden imposed is sufficient to show that the licensing procedure is a most effective device to discourage citizens from receiving publications which are undeniably protected by the First Amendment.

A judgment will be vacated as a result of newly discovered evidence only if the evidence offered is more than cumulative, *Kolan* v. *Csengeri*, 268 F.2d 239 (2d Cir. 1959) (per curiam); *Thomas* v. *Nuss*, 353 F.2d 257 (6th Cir. 1965), and of a nature such as to indicate that a different result would be probable. *Thomas* v. *Nuss, supra; Philippine National Bank* v. *Kennedy*, 295 F.2d 544 (D.C.Cir. 1961); *Baruch* v. *Beech Aircraft Corp.*, 172 F.2d 445 (10th Cir. 1949). In this case, Foreign Assets Control applied very much the same procedure to Teague as it had applied to Charlotte Polin. Since that procedure, as applied in the case of her application, was considered by Judge Tyler, and is part of the record now on appeal before the Court of Appeals, there is no justification for granting relief.

Plaintiffs, pursuant to Rule 30(b), F.R.C.P., have also moved to vacate defendants' notice to take depositions. Judge Tyler held that his disposition rendered moot plaintiffs' prior motion to vacate defendants' deposition notices. A like result is appropriate on plaintiffs' present motion. See *Williams* v. *New Jersey–New York Transit Co.*, 1 F.R.D. 138 (S.D.N.Y. 1940).

The motion is denied.
So Ordered.

Walter R. Mansfield,
U. S. D. J.

Dated: January 9, 1968.

APPENDIX B

Judgments Sought to Be Reviewed

JUDGMENT AFFIRMING JUDGMENT OF THE DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of November, one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

WALTER TEAGUE, III, CHARLOTTE POLIN, UNITED STATES COMMITTEE TO AID THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM, LIBERATION, FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE, and FREE SCHOOL OF NEW YORK, INC.,

Plaintiffs-Appellants,

—v.—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II, and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

JUDGMENT AFFIRMING ORDER DENYING MOTION TO VACATE JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of November, one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

WALTER TEAGUE, III, CHARLOTTE POLIN, UNITED STATES COMMITTEE TO AID THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM, LIBERATION, FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE, and FREE SCHOOL OF NEW YORK, INC.,

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—v.—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II, and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Statute and Regulations

50 U. S. C. App. §5(b), in pertinent part, provides:

> (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States;
>
> • • • • •
>
> Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be

fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; * * *.

The pertinent provisions of the Foreign Assets Control Regulations, 31 C. F. R. Part 500. are:

§500.201 *Transactions involving designated foreign countries or their nationals; effective date.* (a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or

securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) The term "designated foreign country" means

• • • [China, North Korea and North Viet-Nam.]

§500.204. (a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, or rulings, instructions, licenses, or otherwise,

no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is: (1) Merchandise the country of origin of which is China (except Formosa), North Korea, or North Viet-Nam. * * *

§500.204. Appendix.

(108) *Publications and films from China, North Korea and North Viet Nam.* Publications and films originating in mainland China, North Korea or North Viet Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films originating in mainland China. North Korea, and North Viet Nam are also licensed without restrictions as to shipment or method of payment under programs approved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefits to designated countries or nationals thereof from the importations.

§500.503. The Secretary of the Treasury reserves the right to exclude from the operation of any license or from the privileges therein conferred or to restrict the applicability thereof with respect to particular persons, transactions or property or classes thereof. Such

action shall be binding upon all persons receiving actual notice or constructive notice thereof.

§500.801. (a) * * *

(b) *Specific licenses*—(1) *General course of procedure.* Transactions subject to the prohibitions contained in Subpart B of this part which are not authorized by general license may be effected only under specific license. The specific licensing activities of Foreign Assets Control are performed by the central organization and the Federal Reserve Bank of New York. When an unusual problem is presented, the proposed action is cleared with the Director of Foreign Assets Control or such person as he may designate.

(2) *Applications for specific licenses.* Applications for specific licenses to engage in any transaction prohibited by or pursuant to this chapter are to be filed in duplicate on Form TFAC-1 with the Federal Reserve Bank of New York. Any person having an interest in a transaction or proposed transaction may file an application for a license authorizing the effecting of such transaction, and there is no requirement that any other person having an interest in such transactions shall or should join in making or filing such application.

(3) *Information to be supplied.* Applicants must supply all information specified by the respective forms and instructions. Such documents as may be relevant shall be attached to each application as a part of such application except that documents previously filed with Foreign Assets Control may, where appropriate, be incorporated by reference. Applicants may be required to furnish such further information as is deemed neces-

sary to a proper determination by the Control. If an applicant or other party in interest desires to present additional information or discuss or argue the application, he may do so at any time before or after decision. Arrangements for oral presentation should be made with the Control.

(4) *Effect of denial.* The denial of a license does not preclude the reopening of an application or the filing of a further application. The applicant or any other party in interest may at any time request explanation of the reasons for a denial by correspondence or personal interview.

(5) *Reports under specific licenses.* As a condition upon the issuance of any license, the licensee may be required to file reports with respect to the transaction covered by the license, in such form and at such times and places as may be prescribed in the license or otherwise.

(6) *Issuance of license.* Licenses will be issued by Foreign Assets Control acting on behalf of the Secretary of the Treasury or by the Federal Reserve Bank of New York, acting in accordance with such regulations, rulings and instructions as the Secretary of the Treasury or Foreign Assets Control may from time to time prescribe, in such cases or classes of cases as the Secretary of the Treasury or Foreign Assets Control may determine, or licenses may be issued by the Secretary of the Treasury acting directly or through any person, agency, or instrumentality designated by him.

SUPREME COURT, U. S.

FEB 27 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1061

WALTER D. TEAGUE III, CHARLOTTE POLIN, UNITED STATES COMMITTEE TO AID THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM, LIBERATION, FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE, and FREE SCHOOL OF NEW YORK, INC.,

Petitioners,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

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Petitioners,

—against—

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Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners, pursuant to Rule 24, submit this supplement to their petition for certiorari to explain to the Court the reason for the late filing of the petition for certiorari, and pray the Court to accept the petition as timely.

The judgments sought to be reviewed were both entered November 14, 1968. The ninety day period for filing the petition therefore expired Wednesday, February 12, 1969. Corrected page proof of the petition was given to the printer on the morning of February 7, 1969 with instructions to print it, serve the Solicitor General, and send forty copies by first class mail to the Clerk for filing. The printer was unable to complete the job until the morning of Mon-

day, February 10, 1969, and about noon of that day a package of forty copies of the petition was deposited in a branch post office for mailing to the Clerk.

On Sunday, February 9, New York City was hit by a severe snow storm, which disrupted many services and facilities. Unknown to counsel, one of the services which suffered was the United States mail. As a result, the petition was not received by the Clerk until Friday, February 14, 1969, two days out of time.

Counsel had no way of knowing that the storm would cause more than a short delay in mail service. Normally first class mail sent from New York to Washington arrives overnight. Even with the storm, it could not be anticipated that mail would take more than the two and one-half days remaining in which to file the petition. But even if this could have been foreseen, there would have been no possibility of petitioning for an extension of time, as the filing of such petition would have incurred the same delay as the petition for certiorari.

Serious questions have been raised as to the unfairness to a litigant of strict enforcement of rules relating to timeliness, where the tardiness is attributable to the negligence of his attorney. See *Morris* v. *Florida*, 393 U. S. 850 (1968) (Mr. Justice Black dissenting) and cases cited therein. Where the delay in filing is the result of *force majeure*, it certainly should be excused. As this Court said in a different context (the dismissal of a complaint under Rule 37), "where failure to comply has been due to inability, and not to wilfullness, bad faith or any fault of petitioner" the

complaint should not have been dismissed. *Societe Internationale* v. *Rogers*, 357 U. S. 197, 212 (1958).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1061

WALTER D. TEAGUE III, ET AL., PETITIONERS

v.

REGIONAL COMMISSIONER OF CUSTOMS, REGION II, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The judgments of the court of appeals were entered on November 14, 1968. As petitioners recognize in their Supplemental Brief, the time permitted for the filing of the petition or of a motion for extension of time in which to file the petition expired February 12, 1969, ninety days after judgment. 28 U.S.C 2101(c); Supreme Court Rule 34(2). However, the petition for a writ of certiorari was not filed until February 14, 1969, two days after the time had expired, and no extension was timely requested. As this time require-

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ment is jurisdictional, the petition for a writ of certiorari should be denied as untimely.[1]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1969.

---

[1] Petitioners urge that they should be excused because of *force majeure*. Even if such a plea might be entertained in an appropriate case, this is not such a case. The intensity of the snow storm alleged to be the cause of the late filing was apparent on the morning of February 10, before the briefs were deposited at the Post Office. New York Times, February 10, 1969, p. 1, cols. 6, 7, 8 (Late City Ed.). Its lingering effects on city services, including the mails and transportation, were widely publicized. New York Times, February 1 1969, p. 1, cols. 5–6 (City Ed.). Petitioners could have sent additional copies for filing by rail (*ibid.*), or petitioned this Court by telegraph or through Washington counsel for an extension of time in which to file in light of the extraordinary circumstances. Petitioners were thus able to remedy their problem in a timely manner, but they failed to do so.

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IN THE

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OCTOBER TERM, 1968

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Petitioners,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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Petitioners,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Petitioners above named respectfully pray for a rehearing of the decision of the Court, made April 21, 1969, denying the petition for certiorari.

Grounds for Rehearing

It appears from the dissents to the order denying certiorari that the denial was based upon a conclusion that the Court lacked jurisdiction because the docketing of the petition was two days out of time. The delay was the direct

result of a breakdown in mail service caused by a snowstorm. The facts pertaining to the delay were set forth in petitioners' supplemental brief. This petition is limited to a consideration of the jurisdictional issue.

Petitioners believe that the dissenting opinion of Mr. Justice Black correctly analyzed the jurisdictional problem, and within its context point out only one further, but compelling detail: In *Grigsby* v. *Purcell,* 199 U. S. 505 (1879), the Court discussed its refusal, except in unusual circumstances, to consider cases which had been docketed late. It concluded, at 507:

> "The real objection is not that this court has no jurisdiction, but that the plaintiff in error, or the appellant, as the case may be, has failed to duly prosecute his suit."

See also *Southern Pine Lumber Co.* v. *Ward,* 208 U. S. 126, 136-137 (1908).

Petitioners suggest, however, that the issue is even simpler and is clearly determined by the language of the statute itself. The jurisdiction of this Court is left by the Constitution for definition by Congress. The basic grant of jurisdiction is contained in 28 U. S. C. §§1251-1258. The question is whether the time limitation contained in 28 U. S. C. §2101, in a different chapter of the Code, is also jurisdictional. The provisions applicable to this case are those in 28 U. S. C. §2101(c), the first sentence of which requires that a petition for certiorari be docketed within ninety days after entry of the judgment sought to be reviewed. The second sentence of the subsection provides that the period may be extended for cause by a single Justice

for a further sixty days. Except that cause must be shown, the granting of an extension is completely discretionary.

In this case we are concerned only with whether the initial ninety-day period is jurisdictional, for no enlargement had been sought or granted prior to the filing of the petition. But a time period which may be enlarged at the discretion of one Justice cannot conceivably be jurisdictional, no matter how that term be defined.

The statute contains no limitation as to when an enlargement must be sought. Thus, so far as jurisdiction is concerned, enlargement may be sought at any time. (Rule 34 of the Rules of this Court which provides that an application for enlargement of time be made prior to the expiration of the initial period, is not a limitation of jurisdiction.)

Petitioners' supplemental brief, explaining the delay in docketing, prayed that the Court accept the petition as timely. That was certainly a sufficient application for an enlargement of time, which the Court may properly act upon at any time. *Georgia Hardwood Lumber Co.* v. *Compania,* 323 U. S. 334, 337 (1945).

It is helpful to compare the effect of late filing of a notice of appeal in a criminal case under former Rule 37(a) of the Federal Rules of Criminal Procedure. The time limitation contained in that Rule had consistently been held to be "mandatory and jurisdictional." But in *Fallen* v. *United States,* 378 U. S. 139 (1964), the doctrine was relaxed when the delay was beyond the control of the party. The Court said, 378 U. S. at 144:

> "Since petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits."

The *Fallen* case bears a striking similarity to the instant one. There a prisoner gave his notice of appeal to prison authorities for mailing in sufficient time to be received by the clerk if it had been mailed promptly. It arrived two days late, apparently because it had missed by a few hours the twice-weekly mail pickup at the prison.

The history of the amendments to the rules relating to the time for taking appeals in both civil and criminal cases shows clearly the shift away from the earlier doctrine that the time limits were jurisdictional. See 9 *Moore's Federal Practice,* ¶73.09[3] for the development of the rule in civil cases and 8A *Moore's Federal Practice,* ¶37.05[4] in criminal cases.

That no similar recent history appears with respect to 28 U. S. C. §2101 is understandable. Unlike former Civil Rule 73 and Criminal Rule 37, the language of the statute is not restrictive by its terms. The present statute is a much liberalized version of its predecessor considered in *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418 (1923), which apparently provided for no enlargement at all, and which Mr. Chief Justice Taft characterized as jurisdictional.

If §2101(c) does deprive this Court of jurisdiction to consider petitions for certiorari which are delayed by unexpected snowstorms, then the Court must consider whether the statute is constitutional. There is a grave question of due process if a precious right may be lost because of an uncontrollable whim of nature.

The practical consequences of the Court's decision in this case, if permitted to stand, are serious: No litigant may safely entrust papers to the mails. Added to the

already imposing burden of litigation will be the not-insignificant expense of filing petitions for certiorari by hand.

It is ironic that such a rule should emerge in a case in which officers of the United States are parties. The government's inability to cope with a heavy snowstorm will have immunized its acts from review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Of Counsel

Certificate

I hereby certify, pursuant to Rule 58 subdivision 2 of the Rules of this Court, that the foregoing petition for a rehearing is presented in good faith and not for delay and that the said petition is restricted to substantial grounds not previously presented to this Court in the petition for certiorari or the petitioners' supplemental brief.

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